Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1993

JOHN BELSITO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK ,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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60 pp

Question Presented

Does New York State Vehicle and Traffic Law Section 1192.9 violate the due process clauses of the 5th and 14th Amendments to the United States Constitution where it permits a defendant to be convicted of a non lesser included charge without proper notice?

Parties to the Proceeding

The names of all the parties appear in the caption.

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Opinions Below

The petitioner, John Belsito, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Term of the Supreme Court of the State of New York, 9th & 10th Judicial Districts, entered in The People of the State of New York v. John Belsito, on November 3, 1993.

The Honorable George Bundy Smith, Associate Judge of the New York Court of Appeals, issued a Certificate Denying Leave to appeal to that Court on December 14, 1993. That certificate is reprinted in the appendix hereto, p. 1a, infra.

The decision and order of the Appellate Term of the Supreme Court of the State of New York, 9th & 10th Judicial Districts, dated November 3, 1993, upon information and belief has not been reported, and is reprinted in the appendix hereto, p. 3a, 4a, infra.

The oral decision of Judge Joseph C.

Calabrese of the Nassau County District Court during the pre-charge conference has not been reported. The portion of the transcript relating to the pre-charge conference is reprinted in the appendix hereto, p. 13a-23a, infra.

Jurisdiction

The Appellate Term of the Supreme Court of the State of New York for the 9th & 10th Judicial Districts, in its decision and order dated November 3, 1993, affirmed the petitioner's judgments of conviction of driving while intoxicated (Vehicle and Traffic Law §1192.3), unlicensed operation of a motor vehicle (Vehicle and Traffic Law §509.1), and speeding (Vehicle and Traffic Law §1180(b)), which had been rendered on March 13, 1992 in Nassau County District Court. See 3a, 4a, infra.

On December 14, 1993, the Honorable George Bundy Smith, an Associate Judge of the New York Court of Appeals, denied petitioner's

application for permission to appeal to the Court of Appeals. See p. 1a, 2a infra.

The jurisdiction of this Court to review the decision and order of the Appellate Term of the Supreme Court of the State of New York, 9th & 10th Judicial Districts, is invoked under 28 U.S.C. §1257(3).

Constitutional Provisions, Statutes and Rules Involved

The following constitutional provisions and statute are involved in this case.

1. Whether the application of New York State Vehicle and Traffic Law Section 1192.9 [formerly 1192.7, 1196] in the present case violated the Fourteenth Amendment to the United States Constitution:

. . . that no state shall "deprive any person of life, liberty, or property without due process of law." . . . .

2. Whether the application of New York State Vehicle and Traffic Law Section 1192.9 [formerly 1192.7, 1196] in the present case

violated the Fifth Amendment to the United States Constitution in that the defendant was denied due process of law when he was not informed of the charges against him until after both sides had rested their cases. Article I, section 6 of the New York State Constitution provides:

. . . that "[I]n any court whatever the party accused shall ... be informed of the nature and cause of the accusation ...". (See Reasons for Granting the Writ).

3. New York State Vehicle and Traffic Law Section 1192.3 is not a lesser included charge to Section 1192.2 (See Reasons For Granting the Writ). Pursuant to Criminal Procedure Law Section 1.20 the definition of a "lesser included offense" is as follows:

. . . "When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a "lesser

included offense." . . .

Statement of the Case

On December 9, 1990 at approximately 2:30 a.m., John Belsito was driving westbound on the Long Island Expressway in Nassau County, New York, (R. at 83; "R" referring to the official minutes of the trial), when he was signalled to pull his vehicle off to the side of the road by a Nassau County Police Officer. After pulling his vehicle off to the side of the road, the officer requested that Mr. Belsito produce a driver's license, vehicle registration and proof of insurance.

The officer requested Mr. Belsito to step outside his vehicle and to perform certain Field Sobriety Tests, after which he was placed under arrest and transported to the Central Testing Section of the Nassau County Police Department where he was requested to submit to a Breath Alcohol Test and additional sobriety tests. (R. at 135, 140).

At the conclusion of the tests the

defendant was charged with a violation of Vehicle and Traffic Law Section 1192.2 (per se driving while intoxicated), speeding, unsafe lane change, failure to signal and unlicensed operation. Mr. Belsito was arraigned upon a misdemeanor charge of violating Vehicle and Traffic Law (hereinafter referred to as "VTL") section 1192.2, based upon a Breathalyzer reading of .12%.

The defendant was arrested on December 9, 1990 and charged by Simplified Traffic Informations with per se driving while intoxicated (VTL section 1192.2), speeding (s. 1180b), unlicensed operation (s. 509.1), failure to signal lane change (s. 1163d), and unsafe lane change (s.1128a).

The matter was tried before the Honorable Joseph C. Calabrese, District Court Judge of Nassau County, commencing on October 8, 1991. The prosecutor, in his opening statement to the jury, stated:

> The first [Simplified Traffic Information] ... accuses John Belsito ... of

driving ... westbound on the Long Island Expressway ... in violation of New York State Vehicle and Traffic Law Section 1192.2 and the description of the operation is operating with .10 or more percent of alcohol in blood, to wit: .12 percent and it is affirmed under penalty of perjury by Gregory Celentano, the arresting officer.

(R. at 63-64). (see 5a-12a, infra). Not once did the Assistant District Attorney mention that the defendant was being charged with a violation of Section 1192.3.

After receiving testimony from the arresting officer, assisting officer, breath technician, Deborah Cox (a passenger in the Belsito vehicle) and Mr. Belsito, both sides rested their cases. In a conference prior to summations the Court addressed both parties as follows:

All right, now, before summations and in the absence of the jury and pursuant to CPL 300.10, I'm informing both sides that it's my intention to submit to the jury for their consideration, with respect to the first count, a violation of Section 1192.2 with which the defendant is charged, a violation of Section 1192.3 and a violation of Section 1192.1. With respect to each of the other counts the defendant is charged with, only the particular charge that he is charged with and no other charges.

(R. at 390) (see 13a, infra). The District Court based its decision to charge a violation of VTL Section 1192.3 upon VTL Section 1192.9 (formerly 1192.7), which provides:

> A driver may be convicted of a violation of subdivision one, two or three of this Section, notwithstanding that the charge laid before the Court alleged a violation of subdivision two or three of this Section, regardless of whether or not such conviction is based on a plea of guilty.

Immediately following the Court's announcement the defendant timely objected to the Court's proposed instructions on the basis that the defendant was charged with a violation of VTL Section 1192.2 and that the defendant was not previously notified of the charge of VTL Section 1192.3. (R. at 390-400). The defendant further argued that the prosecution had not amended the accusatory instrument to include the additional charge prior to trial, nor had the prosecution ever stated its intention to seek a conviction under VTL Section 1192.3.

The Court denied the defendant's due

process objection to the jury charge of VTL Section 1192.3 and subsequently submitted the Section two, three and one charges to the jury. (R. at 458-468).

In response to arguments made by defense counsel regarding lack of notice, the Honorable Joseph C. Calabrese stated, "I gather a due process argument is not viable either, because the defendant has better notice." (R. at 400), see 23a, infra).

With respect to the impact of the Criminal Procedure Law on Vehicle and Traffic Law Section 1192.9 (formerly 1192.7) the District Court stated:

> The People don't need an amended charge to get Section 1192.3 before the jury. All they need do is produce evidence that could lead a jury to show, prima facie that the defendant could be guilty of 1192.3. That's what they need. They don't need an amended accusatory instrument whatsoever.

(R. at 398-399) (see, "5a", infra).

The District Court, despite the lack of written or oral notice by the District Attorney, ultimately denied defendant's timely

objections to the submission of the 1192.3 charge to the jury and so charged the jury. (see generally R. at 459-468).

The jury returned a "not guilty" verdict to the charge of VTL Section 1192.2, yet returned a "guilty" verdict to Section 1192.3, the section that the defendant objected to on the basis of notice. (R. at 506, 507).

The defendant filed a motion to vacate the judgment pursuant to Criminal Procedure Law Article 440, together with a Memorandum of Law (see Appendix attached and made a part hereto). The motion was denied and the defendant appealed to the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts.

The decision of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts rendered its decision on November 3, 1993, wherein the three Justices of the Court concurred in stating, "In our opinion, Vehicle and Traffic

Law Section 1192(9) is constitutional and valid (See, People v. Farmer, 36 N.Y.2d 386; People v. Fielder, 78 Misc. 2d 7). (See Appendix)

Thereafter the defendant sought leave to the Court of Appeals of the State of New York. The Honorable Justice George Bundy Smith issued a Certificate Denying Leave to Appeal to the Court of Appeals on the 14th day of December, 1993.

Reasons For Granting the Writ

New York Vehicle and Traffic Law Section 1192.9 is unconstitutional on its face because it denies a defendant proper due process notice of the charges against him and permits a conviction of a non-lesser included charge.

A. The defendant was denied Due Process of Law when he was not informed of the additional charges against him until after both sides had rested their cases.

The central issue of this appeal concerns

whether the application of New York Vehicle and Traffic Law Section 1192.9 [formerly 1192.7, 1196] in the present case violated the Fourteenth Amendment guarantee that no state shall "deprive any person of life, liberty, or property without due process of law." Although hundreds of books have been written and thousands of cases decided all centering on what due process exactly means, the fundamental notion that it all boils down to is notice. "A person's right to reasonable notice of a charge against him, and an opportunity to be heard ... are basic in our system of jurisprudence". In re Oliver, 333 U.S. 257, 273 (1948). Justice Frankfurter in his dissenting opinion stated, "Due notice of the charge and a fair opportunity to meet it, are indispensable." In re Oliver, 333 U.S. 257, 284 (1948).

This due process guarantee of notice permeates through the jurisprudence of the state judicial systems as well. Article I,

section 6 of the New York State Constitution provides that "[I]n any court whatever the party accused shall ... be informed of the nature and cause of the accusation ...".

The New York Court of Appeals has stated, "The Constitution does require that the defendant be informed of the nature of the charge and the circumstances under which he is alleged to have violated the law." People v. Boback, 23 N.Y.2d 189, 195, 295 N.Y.S.2d 912 (1968).

The U.S. Court of Appeals for the District of Columbia formulated the following test for determining whether a defendant was given sufficient notice:

> The Constitution requires that the accused be informed "of the nature and cause of the accusation" (Amendment VI), and the cases interpret that to mean that he must be so definitely informed as to be enabled to present his defense. The test, say the courts, is whether the accused was misled.

Hallman v. United States, 208 F. 2d 825, 827 (U.S. App. D.C. 1953). In the present case, there was notice that the defendant was

charged with a violation of V.T.L. Section 1192.2 and that the defendant has a BAC of greater than .10%. This was also reiterated in the prosecution's Bill of Particulars. In fact the written accusatory instruments served upon the defendant together with the statements of the prosecution explicitly stated the charges against the defendant to be: speeding (1180(b)), unsafe lane change (1128(a)), failure to signal (1163(d)), unlicensed operation (509.1) and 1192.2 per se driving while intoxicated (1192.2), to wit: .12%. The defendant's sole theory of defense was to discredit probable cause for the arrest and the breathalyzer reading. The defendant was acquitted on the 1192.2 charged but was convicted on the 1192.3 charge, which was a crime that was never brought to the attention of the defendant until after both sides had rested and proposed jury charges were discussed. The result of the court's election to include the 1192.3 charge was that the jury

was allowed to consider a charge for which the defendant did not endeavor to present a defense.

The leading authority on this issue is the case of People v. Farmer, 36 N.Y.2d 386, 369 N.Y.S.2d 44, (1975). This case appears to hold that a simplified traffic information charging a violation of subdivision 3 of Section 1192 of the Vehicle and Traffic Law gives ample notice to the defendant that pursuant to 1196 (now amended as V.T.L. 1192.9, formerly 1192.7), defendant also faces the possibility of a conviction under subdivisions 1 and 3 of Section 1192 and that subdivisions 1, 2 and 3 are but a species of the same generic offense. Upon a closer look at the decision and the facts upon which it is based, it is indeed not a proper reading of the court's decision.

The main distinction between the facts in Farmer and this case are noted in Judge Fuchsberg's concurring opinion where he notes

that "the prosecutor indicated, during the Voir dire, and later during his opening to the jury, that he intended to seek a conviction under either subdivision 2 or 3 [of VTL Section 1192]. No surprise was claimed by the defendant, nor was an adjournment requested. The trial went forward." People v. Farmer, 36 N.Y. 2d 386, 391, 369 N.Y.S. 2d 44, 46 (1975).

The facts in the case at bar are entirely different. The defendant was not presented with neither written nor oral notice of the intent to charge a violation of 1192.3 prior to trial. Nor did the prosecutor during Voir dire or his opening statement to the jury indicate that he was seeking anything other than a conviction under 1192.2; in fact, he read to the jury the charge of 1192.2 as it appeared on the accusatory instrument. It was not until after both sides had rested their cases that the intention to charge a violation of 1192.3 was brought to the defendant's attention by the Court. As soon as the court

indicated its intention to add the additional charge the defendant timely objected to the inclusion of the charge based upon the failure to notify the defendant. Thus, the distinguishing issue between the cases is that the defendant timely objected and did not waive his right to due process. In the case at bar, this Court must decide whether the defendant in this case was given proper due process notice.

With respect to the question of whether a charge under any subdivision of 1192 provides the defendant with actual or constructive notice of a possibility of a conviction under any other subsection Judge Fuchsberg stated, "Section 1196 [now 1192.9] nowhere suggests that its mere existence on the statute books accomplishes [notice]." People v. Farmer, supra at 392. Judge Fuchsberg continued, "Therefore, Section 1192 itself did not give the defendant notice that a charge of subdivision 2 or 3 is a charge of

all three of its subdivisions in the absence of Section 1196 [now 1192.9] having been brought directly to this attention." People v. Farmer, supra at 393.

B. Vehicle and Traffic Law Section 1192.3 is not a lesser included charge to Section 1192.2.

Although the overriding issue in this case involves a due process question, the subject of lesser included offenses must be addressed because the Court in Farmer felt that it was able to uphold the Constitutionality of Section 1196 [now 1192.9] based upon a theory that somewhat parallels the concept that as in a lesser included situation a jury could find a defendant guilty of a non-charged crime.

Pursuant to Criminal Procedure Law Section 1.20 the definition of a "lesser included offense" is as follows: "When it is impossible to commit a particular crime without concomitantly committing, by the same

conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a "lesser included offense." See People v. Cruz, 48 N.Y. 2d 419, 423 N.Y.S. 2d 625. Criminal Procedure Law Section 220.20 establishes categories, under which conduct or culpable mental state must fall in order to be considered a lesser included offense. The defendant submits that there is no subsection of CPL Section 220.20 that would permit a court to charge a violation of VTL Section 1192.3 on the theory of a lesser included offense.

The elements required to prove a violation of section 1192.2, to wit: "operat[ion] ... while such person has .10 of one per centum or more by weight of alcohol in the person's blood as shown by chemical analysis ...", are entirely different from the elements of Section 1192.3, to wit: "operat[ion] ... while in an intoxicated condition." Using the definition of a "lesser

included offense" it is clearly not "impossible to commit a particular crime without concomitantly committing" the other. See People v. Brown, 53 N.Y. 2d 979, 980, 441 N.Y.S. 2d 662, 663 (1981). For example, it is entirely possible for a defendant to have had a quantity of alcohol in his blood required for a conviction under subdivision 2 and yet not be found in an intoxicated condition under subdivision 3. Likewise, a defendant could be found to be in an intoxicated condition even though the level of the weight of alcohol in his blood fell below the ".10 of one per centum" statutory level.

Previously the Court of Appeals in dealing with this aspect of the issue in People v. Farmer validated the constitutionality of Section 1196 (now 1192.9, formerly 1192.7) under those particular circumstances by analogizing to a conviction of disorderly conduct versus harassment. The Court stated, "[A] conviction will be affirmed

if the evidence establishes a violation of any of the subdivisions of these sections. The distinctions involved are no greater, and indeed, are less than those in the charging and conviction for lesser or included offenses in the criminal law." People v. Farmer, 36 N.Y. 2d 386, 390-391, 369 N.Y.S. 2d 44, 45 (1975). Yet both the concurring and dissenting opinions reject this analysis: Concurring: "the facts of this case make it unnecessary to seriously consider applying the suggestion that [the three offenses] may be regarded as but a 'species' of a single 'generic offense'. People v. Farmer, supra at 393; Dissent: "An analogy is not to be made between these distinct independent offenses and categories of offenses deemed to be lesser included." People v. Farmer, supra at 395.

In People v. Caravalho, the Appellate Division of the Second Department rejected the defendant's argument that charging both subdivisions 2 and 3 violated the prohibition

against double jeopardy by stating, "It is clear that subdivisions 2 and 3 of the Vehicle and Traffic Law s. 1192 were intended to be separate crimes, neither mutually inclusive nor mutually exclusive." People v. Caravalho, 174 A.D. 2d 687, 571 N.Y.S. 2d 332, 333 (App. Div. 2nd Dept. 1991), app. den., 78 N.Y. 2d 1010 (Sept. 1991).

Thus, because the two subsections of Section 1192 are not lesser included offenses, the charge of Section 1192.3 should not have been submitted to the jury for their consideration where the only charge before the Court was an alleged violation of Section 1192.2.

Conclusion

For the reasons cited above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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